118 I.A. 2nd 61

RICHARD J. DALEY, Mayor and Local Liquor Control Commissioner of the City of Chicago, Plaintiff-Appellant, vs. JOHN McMULLAN. Licensee, and the License Appeal Commission of the City of Chicago, A. L. Cronin, Chairman, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HON. EDWARD J. EGAN, JUDGE PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a statutory action under the Administrative Review Act (Ill. Rev. Stats. 1963, c. 110, §§264-279), as provided in the Liquor Control Act, to review the administrative order of the License Appeal Commission. The Mayor of the City of Chicago, in his capacity as Local Liquor Control Commissioner, revoked the defendant's local liquor license which order was revoked by the License Appeal Commission. A judgment was entered in the Circuit Court affirming the order of the License Appeal Commission, from which this appeal is taken.

The Appellant has filed his brief and argument together with an abstract of record, and has complied with all of the requirements of the statute, as well as the rules of this court. The Appellee has not filed an appearance or a brief or an argument in an effort to sustain the order.

Where this condition of the record exists the judgment or order may be reversed without consideration of the cause on its merits. Klein v. Priest #52447 (abstr.); Parkside Realty Co. v. License Appeal Comm. 87 Ill. App. 2d 374.

The judgment affirming the License Appeal Commission is therefore reversed.

JUDGMENT REVERSED.

ADESKO, P. J. AND MURPHY, J.

CONCUR.

(Abstract only)

53614

118 I.A. 2nd 65

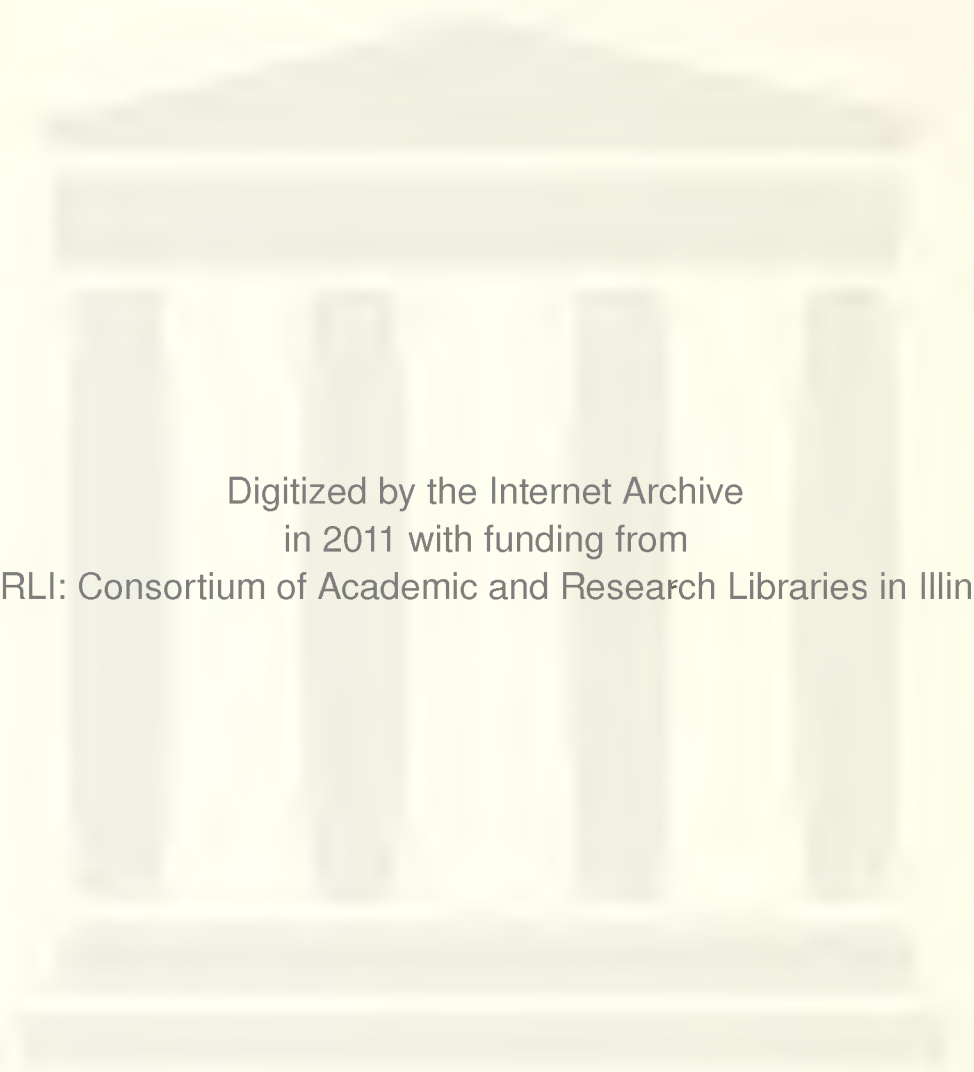
PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. RUSSELL SMITH, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HONORABLE WILLIAM S. WHITE, PRESIDING.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crime of murder and was sentenced to a term of fourteen years to twenty years in the penitentiary. On appeal, defendant has filed, pro se, an "Amendment to Brief" and an "Amendment to Abstract" setting forth additional points and portions of the record not contained in the brief and abstract filed by his counsel.

The deceased, Bennie Anderson, died as a result of a stab wound in the left chest which was inflicted by the defendant on February 18, 1969. Anderson, on that date, was tending bar at a tavern located at 5301 South Princeton Avenue in Chicago. Shortly before 2:00 A.M., which was closing time for the tavern, Anderson found the defendant using one of the glass-enclosed telephone booths on the premises. Anderson tapped on the glass of the booth and asked the defendant to come out, inasmuch as he was preparing to close the tavern. Defendant failed to leave the booth and Anderson again repeated his request. When the defendant again failed to respond, Anderson pushed open the door of the telephone booth, whereupon the defendant stabbed him in the chest with a knife.

Defendant was knocked to the floor by Anderson, who first beat him and then went behind the bar where he procured a shotgun. Defendant exited the tavern and Anderson followed him outside,



but the shotgun was taken from him by several persons who had been in the tavern. A passing automobile was halted and Anderson was taken to a hospital where he later died of the stab wound.

Mrs. Sandra Anderson, wife of the deceased, testified that she was in the tavern on the morning in question and observed the defendant enter the telephone booth about 1:50 A.M. She was seated nearby in a lounge booth with Mrs. Yvonne Maulden, the latter woman facing the telephone booth occupied by the defendant. Mrs. Anderson testified that she heard her husband twice tell the defendant to come out of the telephone booth. She testified that she turned toward the telephone booth and observed the defendant attack her husband with a knife, stabbing him in the left chest. The witness testified that her husband then knocked the defendant to the floor and began "stomping on him," during which time the defendant stated, "Man, I didn't mean it. I didn't mean to do it." The witness also testified that defendant later repeated this statement in her presence at the police station. Mrs. Anderson testified that her husband went for a shotgun behind the bar, and that the defendant then "slid" out the door of the tavern. She further testified that her husband had nothing in his hands at the time of the attack.

Ollie Armour, owner of the tavern, testified that shortly before 2:00 on the morning in question, Anderson was holding open the front door of the tavern so that customers were able to leave by closing time. After all the customers had filed out of the tavern, Armour noticed the defendant in the telephone booth. He testified that Anderson knocked on the booth and asked the defendant to come out since it was closing time, and that the defendant thereupon came out of the booth and stabbed Anderson in the left shoulder with a knife. The witness testified that Anderson and the defendant tussled on the floor for a while after

the stabbing, after which the defendant "crawled" out of the tavern.

Armour further testified that he had seen the defendant in his tavern on some fifty prior occasions. He also stated that he had seen, on several previous occasions, the knife used by the defendant in the stabbing several weeks prior thereto; the defendant, on those occasions, was in the tavern with some other men "just pranking with [the knife], just have it out, pranking with some of the fellows."

Mrs. Yvonne Maulden testified that she was seated in the lounge booth with Mrs. Anderson and that she observed the defendant enter the telephone booth. Bennie Anderson went to the booth two or three times in an attempt to get the defendant to leave, and on the last occasion, when Anderson pushed open the door to the booth, the defendant stabbed him in the chest with a knife. Mrs. Maulden testified that the two men then struggled on the floor, after which the defendant "crawled" out the door, stating to Anderson that he did not intend to hurt him.

Walter Jennings, another bartender in the tavern at the time, testified that he observed Anderson knocking on the telephone booth in an attempt to get the defendant to leave. He testified that he then went to the back of the tavern from where he heard Anderson cry out, "He cut me, I am cut!" Jennings returned to the main part of the tavern to observe the defendant going across the street. The witness further testified that he later led the police to the defendant's home across the street from the tavern. He stated that he did not notice any fresh cuts or marks on the defendant's hands or face at the time the officers arrested him.

Henry Maulden, a part-time bartender in the tavern, testified that he observed the defendant enter the tavern shortly before closing time and enter the telephone booth. He testified that

Anderson attempted to get him out of the booth, that the defendant "rushed out of the phone booth," and that he heard Anderson say, "I am cut; I am cut!" The witness observed a knife on the floor of the tavern after the incident.

The arresting police officers testified that they arrived at the tavern and found a knife lying on the floor in a pool of blood. They were then led to the defendant's apartment where they found him in bed and placed him under arrest. They further testified that they observed no fresh cuts or abrasions on the defendant's hands or face, and that they found a jacket and shirt spotted with blood soaking in a wash tub in the apartment.

Mrs. Mary Cole testified that she worked as a laboratory technician at the University of Chicago. She testified that she received a telephone call from the defendant about 2:00 on the morning in question and that the defendant requested a loan of money from her. During the conversation, Mrs. Cole testified, she heard a commotion on the defendant's end of the line, during which profanity was used. She testified that someone was telling defendant to "come out of the booth" and defendant was telling him to "wait a minute." The witness testified that she heard a "banging sound," that the line "went dead" for a period of time, and that it "went back on again." She further testified that she was a friend of the defendant and his family.

Defendant testified that he entered the tavern about 1:55 on the morning in question to telephone a family friend, Mrs. Cole. Anderson came to the booth, knocked on the door and stated, "Come out, we're closing," to which the defendant replied, "Okay, Bennie, I am coming out." Anderson left, but returned, kicked the door of the booth, and with some foul words, stated, "I mean now." With that, Anderson reached into the booth and "masked the phone down." The defendant stated that he told Anderson that he was

coming right out, but that Anderson proceeded to punch him in the face, knocking off his eyeglasses, and attempted to kick him while in the booth.

The defendant testified that he observed a knife sticking out of Anderson's pocket, that he became frightened and grabbed Anderson, and that both men tussled and fell to the floor. The defendant testified that he attempted to wrest the knife from Anderson, that the knife was stuck in defendant's hand, and that after he got the knife out of his hand, he threw it to the left of Anderson and got off him. The defendant then asked Anderson why he attacked him and Anderson stated that he was going to kill him. He testified that Armour then placed a shotgun on the bar and that he, defendant, ran from the tavern.

Defendant further testified that he went home, told his wife about the fight and showed her the wounds on his forehead and in his hand which he received in the fight, and then washed up and went to bed. A short while later, the police arrived and placed him under arrest. Defendant denied stabbing Anderson and testified that he did not carry a knife and that he did not have a knife in his possession on the day in question.

On cross-examination the defendant related that he received wounds on the forehead and in the hand during the fight with Anderson, and that he did not tell the arresting officers that he knew nothing of the knife used in the incident.

One of the arresting officers testified in rebuttal that the defendant denied possession of a knife on the day in question. He further testified that the defendant bore no fresh cuts or abrasions at the time he was arrested, only old scars.

A police lock-up keeper photographed the defendant immediately after the arrest and testified that he observed no fresh cuts or abrasions on his person at that time. He further testified that he noticed only old scars on the defendant. The witness also testified that the photograph, which was introduced into evidence

over objection, accurately portrayed the defendant on the date of his arrest.

Defendant maintains that he was not proved guilty beyond a reasonable doubt. All of his arguments in this regard relate to the credibility of the witnesses and the weight to be given to the evidence by the trier of fact.

He argues that the testimony of the People's witnesses is conflicting as to the manner in which the defendant exited the tavern after the stabbing. He states that some witnesses testified that the defendant "slid" out of the tavern, others testified that he "crawled" out, and another that he "ran" out. Defendant contends that the degree of credibility of the witnesses' testimony may be ascertained from the foregoing "conflicts" in the testimony.

There was no testimony by any of the witnesses that the defendant "ran" out of the tavern after the stabbing; Walter Jennings, to whom this testimony is attributed, stated that he did not see the actual stabbing, that he came "from behind the bar, after [defendant] went outside the door," and that he saw the defendant "walk across the street." The difference, if any, between the terms "slid" and "crawled" as used by the other witnesses who observed the defendant leave the tavern, was clearly a matter for determination by the trier of fact, and does not amount to such conflict in the evidence as to create a reasonable doubt. People v. Kelly, 8 Ill. 2d 604; People v. Hobbs, 35 Ill. 2d 263.

Defendant states that the testimony of the occurrence witnesses is suspect because they were either relatives, close friends or co-employees of the deceased. This fact was disclosed to the jury, as was the fact that the defendant was also on a "first name basis" with some of the occurrence witnesses. This was a matter of credibility for the jury.

Finally, the defendant states that there is a direct and serious conflict between the testimony of Mrs. Anderson and that of Mrs. Maulden. He states that Mrs. Anderson testified that she actually observed defendant strike her husband with the knife, whereas Mrs. Maulden testified that she called to Mrs. Anderson after the stabbing occurred, telling Mrs. Anderson that her husband had been stabbed. The record reveals that Mrs. Maulden testified that she told Mrs. Anderson that the defendant was "getting ready to cut" the deceased, after she saw the defendant hold up the knife.

A review of the evidence for the People shows that the defendant, for no apparent reason other than that he was told to leave the telephone booth, stabbed Anderson in the chest, causing his death. We find nothing in this record to support the defendant's contention that he was not proved guilty beyond a reasonable doubt. The cases cited by the defendant in support of this position relate primarily to the question of reasonable doubt due to unconvincing evidence, and are distinguishable for that reason from the case at bar. See e.g. People v. Coulson, 13 Ill. 2d 290; People v. Ware, 23 Ill. 2d 59; People v. Dawson, 22 Ill. 2d 260.

Defendant next contends that the trial court committed prejudicial error by allowing the photograph taken at the time of the defendant's arrest to be exhibited to the jury, inasmuch as it bore a number and therefore gave the jury the impression that the defendant had a past record. While we are in agreement with the general proposition of law stated by the defendant, that it is error to acquaint the jury with an accused's past criminal offenses or charges as bearing on the question of his guilt of the crime charged, (People v. Williams, 72 Ill. App. 2d 96; People v. Lewis, 25 Ill. 2d 396,) that rule has no application to the situation in the case at bar.

The photograph of the defendant was taken by the lock-up keeper at the time of defendant's arrest for the crime in question. The jury was fully apprised of this fact and consequently was made aware of the nature of the photograph. The photograph carried no message or connotation of any prior conviction or criminal charge against the defendant. The photograph showed also that the defendant had suffered no injury to his face in the fight with Anderson as he had claimed, corroborating the testimony of several of the People's witnesses in this regard.

In his "Amendment to Brief" defendant contends that improper and prejudicial evidence of a nickname of defendant was brought to the attention of the jury. On the cross-examination of People's witness Mrs. Anderson, it was brought out that she had heard her husband refer to the defendant as "Batman." Defendant did not request that this remark be stricken at the time it was made. When the prosecutor, on re-direct examination, asked the witness if her husband referred to the defendant as "Batman," the defendant objected and a hearing on the matter was had outside the presence of the jury. It was brought out in that hearing that the nickname was the result of defendant's allegedly having struck another person with a baseball bat, putting him in the hospital for three weeks. The objection to the question was sustained, and the prosecutor thereafter continued on to other matters on the re-direct examination of the witness. The reason behind the nickname was never heard by the jury, and the mere name "Batman" of itself connotes nothing infamous which might prejudice the jury against the defendant.

The case of People v. Bush, 300 Ill. 532, cited by defendant in support of this position, is not applicable here for the reason that the prosecutor in the Bush case repeatedly asked the defendan

on cross-examination, incompetent questions which had no purpose other than to lead the trier of fact to infer facts not otherwise legally provable. (See People v. Black, 367 Ill. 209, and People v. Stetz, 201 N.Y.S. 79, which are also not in point.)

Defendant next complains that it was error to allow the People's witness Armour to testify that he had seen the defendant with the knife used in the stabbing some weeks prior thereto, since it "undoubtedly [gave the jury the impression] that the Appellant had threatened some of the other patrons of the tavern with the knife." The defendant denied carrying a knife or having a knife in his possession on the day in question. The evidence so elicited from Armour connected the defendant to the knife on prior occasions. Further, what the witness meant when he stated that he observed the defendant "pranking" with the knife was for the jury to determine; that term, of itself, does not imply that the defendant had threatened anyone with the knife.

The case of People v. Bennett, 413 Ill. 601, cited by the defendant, is not in point. In Bennett, a statement which was given to authorities by a witness who identified his statement at trial, and which contained matters allegedly stated by the defendant at the time of the crime, was held inadmissible for the reasons that the witness' statement was made outside the presence of the defendant, was never placed in defendant's hands to read, and when read to defendant, was not commented on by him.

It is further pointed out by the defendant in his "Amendment to Brief" that the prosecutor, during closing argument to the jury, made reference to the defendant's testimony that he had been injured during the fight with Anderson and that he showed the wounds thus received to his wife; defendant argues that the

prosecutor committed error when he then commented that the jury could take into consideration that the wife did not testify as to the wounds. This was proper comment by the prosecutor. People v. Sanford, 100 Ill. App. 2d 101.

Defendant also states that the prosecutor improperly characterized the knife used in the stabbing as a "dagger" and argues that this characterization prejudiced the jury since the knife was only a small pocket knife. The knife in question was used to commit a homicide; the knife, entered into evidence as People's Exhibit #1, was shown to the jury. There was no error in this regard.

The prosecutor further argued in his final argument in rebuttal that the defendant, in his closing argument, had attempted to "cloud the issues" by arguing that Mrs. Anderson did not actually see her husband get stabbed, as she testified, in light of the testimony of Mrs. Maulden. The prosecutor's comment was not improper when considered in the light of what Mrs. Maulden testified, that she told Mrs. Anderson that defendant "was getting ready to cut" the deceased. This was a question for the jury.

The defendant next contends that it was error for the prosecutor to "give expert testimony" when commenting upon the testimony of Mrs. Cole that the telephone connection "went dead" and then "went back on again" as she was speaking to the defendant. The prosecutor commented that, if such were the situation, the connection would have been completely broken since the action was taken on the caller's end of the connection. Defendant states that the prosecutor was giving "expert testimony" as to the functioning of a telephone system, since there was no evidence in the record on the subject. However, the prosecutor called upon the jury to use their own experience in the use of telephones in weighing the evidence given by Mrs. Cole in this regard. This was not improper comment by the prosecutor.

Defendant contends that the trial court erred in refusing to allow him the opportunity to see a copy of a statement which was reduced to writing from statements made by the defendant to a police officer after the defendant's arrest, when the prosecutor attempted to impeach the defendant from the statement. Defendant objected to the use of the statement, and a discussion was held in chambers between the court and counsel for the parties. The trial court learned that the defendant had been served with a copy of the statement one week prior to the trial, pursuant to order of court, and the objection was overruled. This is not a situation where the defendant was deprived of the statement and precluded from having a hearing thereon. (The case of People v. Taylor, 33 Ill. 2d 417, cited by defendant, is not in point.) Further, the matters contained in the statement here were gone into by defense counsel on the re-direct examination of the defendant.

Defendant admitted to having made statements to a police officer, but when asked to identify the officer to whom the statements were made, the defendant testified that he did not recall. We find no error in the action of the trial judge in permitting the prosecutor to bring one of the investigating officers into the courtroom for the sole purpose of affording the defendant an opportunity of recalling whether he was the officer to whom the statements were made.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

53851 118 I.A. 2nd 65-2

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM
Plaintiff-Appellee,	)	CIRCUIT COURT,
	)	COOK COUNTY.
v.	)	
	)	
CLIFTON HALE, JUNIOR,	)	HONORABLE
	)	JOSEPH A. POWER,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of court imposing a sentence upon revocation of probation. Defendant contends that the sentence is excessive.

In May 1967 defendant pleaded guilty to a charge of burglary and was placed on probation for five years, the first year to be served in the House of Correction. Defendant was released from the House of Correction in January 1968. In October he was brought before the trial judge on a rule to show cause why his probation should not be terminated, in that he had been convicted and sentenced on a charge of criminal trespass to property in August 1968. After a hearing, the court ordered that the probation be terminated and sentenced him to a term of three years to twelve years in the penitentiary, from which order this appeal is prosecuted.

Defendant argues that the sentence imposed is contrary to the philosophy of rehabilitation and "defeats the effectiveness of the parole system by making mandatory the incarceration long after rehabilitation has been accomplished."

At the time the defendant pleaded guilty to the burglary he was nineteen years of age and had a record of several prior misdemeanor convictions for which he had served time in the House of Correction. The trial judge noted that the time defendant had spent in the House of Correction brought no improvement in his behavior.

The violation of probation was not of a technical nature, but involved the commission of a crime eight months after his release from the House of Correction. The sentence imposed upon the termination of the probation is within the limits set out by the statute. (See Ill. Rev. Stat. 1967, Chap. 38, Para. 19-1.) The trial court heard evidence concerning the burglary and concerning defendant's past criminal record. There was no evidence offered in mitigation. Where a sentence is within the limits set by statute, it will not be disturbed on review unless it constitutes a substantial departure from fundamental law and its spirit and purpose, or is not proportionate to the nature of the offense. People v. Davis, 111 Ill. App. 2d 68; see also People v. Smith, 105 Ill. App. 2d 14. The sentence imposed is not excessive in light of defendant's record.

The cases cited by the defendant to support his position are inapposite on their facts. In People v. Smith, 98 Ill. App. 2d 406, the defendant, who did not have a prior criminal record, was sentenced to a term of not less than nineteen years and ten months to not more than twenty years in the penitentiary on a charge for which the statute provided a maximum penalty of twenty years. In People v. Marshall, 96 Ill. App. 2d 124, the sentence was reduced in light of "the nature of the offense and the attending circumstances," whereas here the circumstances call for no reduction of the sentence.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

NO. 69-88 118 I.A. 2nd 116 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OTIS KIDD, JR., Plaintiff-Appellant, vs. COUNTY OF STEPHENSON, ALVIN STINE, BUFORD LOWER and DENNIS LAMOREUX, Defendants-Appellees.	Appeal from the Circuit Court of the 15th Judicial Circuit, Stephenson County, Illinois.

PRESIDING JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

This appeal is from the granting of a motion for summary judgment arising out of an action for false arrest and imprisonment.

December 8, 1968, one Mrs. Fred Cromwell appeared before a magistrate and signed a complaint for disorderly conduct (Ill. Rev. Stat. 1967, Ch.38, Sec. 26-1). Based upon the complaint the magistrate issued a typewritten warrant naming "Otis Kidd" as the defendant. Prior to delivery of the warrant to a deputy sheriff, the magistrate informed him that there may be an Otis Kidd, Sr. and Otis Kidd, Jr. and to check with the complainant as to which one was intended. The deputy responded that he would have a deputy Bell do so.

Between the time of issuance of the warrant and its execution, the letters "Jr" were placed after the name Otis Kidd. Discovery depositions of various persons disclose that a deputy, whose duty was matron and bookkeeper, testified that she phoned the magistrate's office and was informed by the magistrate's clerk that the Otis Kidd referred to in the warrant was Jr. She then placed the designation, Jr., in ink, after the name Otis Kidd. The magistrate's clerk denies any such conversation taking place. The deposition of deputy Bell discloses that he personally interviewed the complainant, prior to the issuance of the warrant, and she stated that it was Otis Kidd, Jr. and not Otis Kidd, Sr. who was guilty of the alleged offense. A copy of his report was attached to an affidavit filed by him which is as follows:

> "Fred Cromwell called the office requesting a Deputy, Upon arrival Mrs. Ethel Cromwell Stated to me that earlier a man by the name of Ottis Kidd Jr. had disturbed her, in the manner of: Said as he was crossing her property he was Drunk, and used abusive language, Calling her obsene, and Vulgar names, Also refused to leave her premises, Mrs. Cromwell was asked if this was Ottis Kidd Jr. or Ottis Kidd Sr., She stated it was Ottis Kidd Jr., She was advised she could sign a warrant on any person that used this attitude, She then started to see the Magistrate Judge." (Sic)

The complainant's deposition, on the other hand, denies that she had such a conversation with deputy Bell and goes on to state that she never knew Otis Kidd, Jr.

The plaintiff voluntarily appeared at the sheriff's office after work since he was notified by telephone by his wife that someone from the sheriff's office was at his home looking for him. At the time of his appearance he informed the arresting officers that he was not the person they were looking for and asked that they check for certain before making the arrest. He was asked if it might be his father and replied that he did not know. The officers then proceeded with the arrest and after fingerprinting and photographing him, he was released upon a cash bond. He was detained for approximately 45 minutes. Some two days later, the magistrate was informed by the complainant that Otis Kidd, Jr. (the plaintiff herein) was not the party, but rather that it was his father, who had committed the offense. The charge against the plaintiff was then dismissed. Thereafter the instant action was commenced and a jury was demanded.

The plaintiff and defendant each moved for a summary judgment supported by affidavits and discovery depositions. The trial court allowed a summary judgment in favor of the defendant and denied the plaintiff's motion for the same. The plaintiff appeals from both the denial of his motion for summary judgment and the granting of the same to the defendant.

A written memorandum of decision with a supplement thereto was filed herein. It was the court's position that deputy Bell's report which was read by the arresting officer previous to the plaintiff's arrest, formed a sufficient foundation for the apprehension of the plaintiff. The court reasoned that this, by itself, would be controlling as to whether or not the arresting officers had reasonable grounds upon which to make the arrest, regardless of the issuance of a warrant. The memorandum went on to state that if a trial on the merits were had, based upon the affidavits and depositions introduced, the court would be compelled to direct a verdict in favor of the defendants because of this report.

The purpose of a summary judgment proceeding is to determine if a genuine issue of material fact exists. Giova v. Carrol, 109 Ill. App. 2d 259, 265 (1969). Much of the evidence introduced to support the summary findings is in conflict. For the purpose of this opinion, it is sufficient to point out that the truth of the facts recited in the deputy's report, upon which the court relied, was an issue of fact. The deputy claims that the report is based upon his interview with the complainant; however, the complainant denies that such interview took place. The proper trier of fact on this issue would be the jury and not the court.

On this appeal we do not reach the question of justification of the arrest, only whether a question of material fact exists. We conclude from a review of the record that such question is present and therefore the order granting a summary judgment to the defendants herein must be reversed. For the same reason, the order denying the plaintiff's motion for summary judgment must be affirmed.

A motion by the appellee to have the cost of additional abstracts assessed against the appellant, and objections thereto, were filed herein and taken with the case. The motion is denied.

AFFIRMED IN PART: REVERSED IN PART
AND REMANDED

Davis and Seidenfeld, J.J. - Concur

No. 53684

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
PETER P. HARRISON,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Hon. L. Sheldon Brown, Presiding.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Peter P. Harrison, was charged with the rape and armed robbery of his sister-in-law. After a bench trial, defendant was found guilty of both charges, and sentenced to a term of five to eight years in the penitentiary.

On appeal, defendant contends that his jury waiver was not understandingly made, and that the sentence was void because it did not specify for which crime he was sentenced. Since these are the only points on appeal, we deem it unnecessary to set forth the facts.

Defendant first argues that his jury waiver was not understandingly made. At trial the following proceedings took place:

DEFENSE COUNSEL: At this time we would like to file a jury waiver and proceed.
THE COURT: That is your signature on this document?
THE DEFENDANT: Yes, Sir.
THE COURT: This document is a jury waiver. You realize that when you sign this you are waiving your right to trial by jury?
THE DEFENDANT: Yes, Sir, I understand, Your Honor.
THE COURT: You want to be tried by the Court?
THE DEFENDANT: Yes, Sir, I will be tried by the Honorable Judge.

The Criminal Code provides that the right to a jury trial must be knowingly and understandingly waived in open court. Ill. Rev. Stat. 1967, ch. 38 §103-6. Whether this right has been understandingly waived depends upon the facts and circumstances of each case. People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708 (1964).

In the instant case, we find that defendant was adequately apprised of his right to a jury trial in open court. The colloquy between court and defendant, shown above, clearly reveals that defendant understood the difference between a jury and a bench trial, that he understood the effects of his waiver, and that he wished to be tried by the judge.

Defendant next contends that the sentence is void because it does not specify for which crime defendant was sentenced. The trial judge, after finding defendant guilty of both crimes, stated:

> "Peter Harrison, on the finding of guilty to both counts here, and after hearing the evidence in aggravation and mitigation, I sentence you to the Illinois State Penitentiary for a term of not less than five nor more than eight years."

The sentence of a court must be definite and certain. People v. Dodge, 411 Ill. 549, 104 N.E.2d 633 (1952). In People v. Toomer, 14 Ill.2d 385, 152 N.E.2d 845 (1958), the court at p. 387, stated:

> "A judgment in a criminal case must be clear and definite, so that its meaning may be found from the language used without resorting to judicial construction to ascertain its import."

In the case at bar, the judgment of the trial court was clear and definite. "From the language used," People v. Toomer, supra, it is clear that the trial judge was sentencing defendant "on the finding of guilty to both counts here." Thus, defendant was properly sentenced for both crimes. It is axiomatic without need

of citation that two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions to the contrary appearing in the judgment. Consequently, the sentences of 5 to 8 years on the two charges are to run concurrently.

Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY, P.J., and SCHWARTZ, J., concur.

V. 118 p. 159

118 I.A. 2nd 159

53600

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EARNEST HARRIS (Impleaded), Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. L. Sheldon Brown, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, represented by the Public Defender, pleaded guilty to the offense of burglary. On August 14, 1968, and after hearing testimony stipulated to by agreement between the prosecutor, defendant and his counsel, the court found defendant guilty and sentenced him to the penitentiary for six to twelve years.

On August 29, 1968, defendant filed his notice of appeal and the Public Defender was appointed as appeal counsel for the defendant. On August 7, 1969, the Public Defender filed in this court a motion for leave to withdraw as appellate counsel for defendant pursuant to the ruling in the case of Anders v. California, 386 U.S. 738 (1967), and filed a brief in support of the motion, in which it is asserted that the appeal is without merit and could not possibly be successful. Copies of the motion to withdraw and brief were mailed by the Public Defender to the defendant on August 7, 1969.

On September 18, 1969, defendant was notified by this court that he had until November 19, 1969, to file any point he might choose in support of his appeal, after which date the court would make a full examination of all proceedings and determine whether the appeal is meritorious. Defendant has not responded and has failed to file any such points.

The brief and argument state that the only basis for an appeal would be whether the trial court fully admonished defendant

as to the significance and consequences of his change of plea from not guilty to guilty. The record shows that when the case came on for trial on August 14, 1968, the following colloquy took place in open court:

> THE CLERK: People of the State of Illinois versus James G. Jones and Earnest Harris.
>
> MR. BEAN: Your Honor, at this time I will inform the Court that I have spoken to Mr. Earnest Harris and he informs me that he wishes to withdraw his previously entered plea of not guilty and enter a plea of guilty to indictment 68-1787.
>
> THE COURT: All right. Mr. Harris, you know you are entitled to a trial by jury. We already have twelve (12) jurors. They are not sworn yet. But you could go ahead with your jury trial if you so choose. You want to plead guilty or have a trial by a jury?
>
> DEFENDANT HARRIS: I'll plead guilty.
>
> THE COURT: Now, you understand that there, this plea of guilty is strictly your own choosing. That there has been no promises whatsoever made to you. You understand that?
>
> DEFENDANT HARRIS: Yes.
>
> THE COURT: Strictly your own. This is your own idea and your own choice?
>
> DEFENDANT HARRIS: Yes.
>
> THE COURT: And you have communicated this to your lawyer, Mr. Bean, and this is what you want to do of your own free will?
>
> DEFENDANT HARRIS: Yes.
>
> THE COURT: All right. Let me tell you one other thing. On your plea of guilty to burglary, I could sentence you to the penitentiary for a term of not less than one (1) year and any number of years thereafter. Now knowing that do you still persist in your plea of guilty?
>
> DEFENDANT HARRIS: Yes.

The point raised in defendant's brief is governed by the following:

> The Code of Criminal Procedure, Section 115-2 (Ill. Rev. Stat. (1967), Ch. 38, § 115-2):
>
> > Pleas of Guilty. (a) Before or during trial a plea of guilty may be accepted when:
> >
> > (1) The defendant enters a plea of guilty in the court;
> >
> > (2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

Supreme Court Rule 401(b), (36 Ill.2d 167; Ill. Rev. Stat. 1967, Ch. 110A, § 401(b)):

> (b) Procedure on Plea or Waiver. The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused understands * * * the nature of the charge against him, and the consequences thereof if found guilty, * * *. The inquiries of the court, and the answers of the accused to determine whether he * * * comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case. * * *.

We agree with the Public Defender that the record establishes that the trial court's admonition to the defendant on his plea of guilty was adequate, and it did adhere to the requirements of Chapter 38, § 115-2 and Supreme Court Rule 401(b), as construed in People v. Ballheimer, 37 Ill.2d 24, 26, 224 N.E.2d 811 (1967), and People v. Kontopoulos, 26 Ill.2d 388, 390, 186 N.E.2d 312 (1962).

We conclude the appeal is without merit. Defendant's counsel is granted leave to withdraw, and the judgment of conviction is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

118 I.A. 2nd 453
No. 69-55

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
LONZO STAFFORD,
Defendant,
and
ARNOLD B. HARRIS,
Appellant.

Appeal from the Circuit Court of Lake County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Arnold B. Harris, an attorney, appeals from an order holding him in contempt of court and fining him $25.00 plus $10.00 in costs.

It appears from the record that on September 9th, 1968, Lonzo Stafford was issued an Illinois Uniform Traffic Ticket and Complaint, charging him with driving after his license had been revoked, and notifying him of the trial date of October 22nd, 1968; that on defendant's motion the case was continued to November 26th, 1968; and that on that date defendant waived a jury and was tried by the court. A judgment of guilty was entered and Stafford was fined $300.00 and costs.

The record includes a "rule to show cause" against Harris returnable December 10th, 1968. The rule, in substance, recites that Lonzo Stafford, being sworn and under oath, having stated that Harris was his attorney and that he had paid Harris a retainer fee and Harris not appearing, it was ordered that a rule be entered to show cause why he should not be held in contempt of court.

A Report of Proceedings prepared pursuant to Supreme Court Rule 323 is quoted in full:

> "Lonzo Stafford appeared in Mundelein Branch Court, Branch V, Lake County, Illinois on Nov. 26-1968. At that time the Honorable Eugene Daly was on the bench. Mr. Stafford's case was called and Mr. Stafford appeared without Counsel. Mr. Stafford represented to the court at this time that one Arnold B. Harris was his attorney and that he did not know where Mr. Harris was. Mr. Stafford informed the court that he had paid Mr. Harris, his attorney, a retainer fee of $100.00 to appear on his behalf. Mr. Stafford asked the court to allow him to make a phone call to ascertain why Mr. Harris was not present in court.
>
> Subsequently, Mr. Stafford returned and informed the court that Mr. Harris was reportedly on trial on another matter in Chicago. The court required Mr. Stafford to go forward with his case, and at the same time issue a rule to show cause upon Mr. Harris. Said rule was made returnable December 10, 1968, in Wauconda Branch Court, Branch IV, Lake County, Illinois.
>
> On December 10, 1968, Mr. Stafford again appeared, though his own case had already been disposed of in Mundelein. He appeared as a witness to testify concerning the rule to show cause issued against Mr. Harris. Mr. Stafford appeared in the Wauconda Branch Court, Branch IV, Lake County, Illinois, and on Nov. 26-1968 the court accepted a receipt from Mr. Stafford. Mr. Stafford informed the court that said receipt was for the $100.00 retainer fee paid to Mr. Harris. Mr. Harris didn't appear at this time. The court was informed that service of the rule to show cause had not been accomplished on Mr. Harris. The court accepted the receipt tendered by Mr. Stafford and made it a part of the court record. The Honorable Eugene Daly then ordered the State's Attorney's Office to prepare another rule to show cause on Mr. Harris. The court further ordered a capias to issue returnable forthwith.

Following the court's order to issue the new rule to show cause, the State's Attorney inquired of the Honorable Eugene Daly if he could call Mr. Harris to see if he would come in voluntarily. The court informed the State's Attorney's Office that he could so if he so wished.

Consequently, a phone call was made to Mr. Harris's Office. Mr. Solomon, representing himself to be a partner of Mr. Harris answered. The State's Attorney's Office informed him of the rule to show cause that existed against Mr. Harris. At this time, Mr. Solomon informed the State's Attorney's Office that neither he nor Mr. Harris represented Mr. Stafford. The State's Attorney's Office again informed him that a rule against Mr. Harris did exist. Mr. Solomon informed the State's Attorney's Office that both he and Mr. Harris would come in voluntarily to explain the situation to the Honorable Eugene Daly. The State's Attorney's Office informed Mr. Solomon where the new rule to show cause was returnable. Such rule was made returnable on December 13, 1968, at Fox Lake Branch Court, Branch III, Lake County, Illinois. Since the respondent had indicated he would come in, the capias was stayed.

On December 13, 1968, the case regarding the rule to show cause against Arnold B. Harris was called. The Honorable Eugene Daly, again, appeared on the bench. When the case was called, the respondent Arnold B. Harris stepped forward. The court asked that the respondent Arnold B. Harris be sworn and explain why he should not be held in contempt of court. Respondent Arnold B. Harris refused to be sworn, stating that the court did not have jurisdiction over him. The court then explained to the respondent that, since he was in court, he had surrendered himself to the jurisdiction of the court and the court had the power to inquire as to why Arnold B. Harris had not represented Lonzo Stafford and asked him again to be sworn. The respondent again refused to be sworn and again state(d) that the court lacked jurisdiction. The court, again, repeated that it had jurisdiction and asked the defendant to be sworn. Again the defendant refused. The court, therefore, held him in contempt of court and fined him $25.00 plus $10.00 court costs.
(X) From which order the said Arnold B. Harris now appeals.

(X) For respondents wilful and contumacious refusal to submit to the order of the court. (In the court's own handwriting)"

An undated receipt on the letterhead of Harris's law firm is certified by the Magistrate as a part of the record and

recites:

> "Received of Lonzo Stafford the sum of One Hundred Dollars ($100.00) to apply on account of legal services rendered and to be rendered," and is signed by "A.B. Harris".

The order appealed from recites:

> "Now on the 13th day of December, A.D. 1968 this cause coming on to be heard before the honorable Eugene Daly on a Rule to Show Cause why Arnold Harris, Attorney, should not be held in Contempt of Court. The Court finds the following:
>
> That the Respondent, Arnold Harris, appears without service of process. Court orders witnesses sworn, Respondent, Arnold Harris, refuses to be sworn. Court advises Respondent he is an officerof the court and subject to the jurisdiction of the court. Respondent challenges the jurisdiction of the Court over the Respondent. Court finds it has jurisdiction over the Respondent, Arnold Harris, that the Respondent has failed to answer the Rule heretofore entered against him, and that the Respondent has failed to purge himself of the said Contempt, and that the Respondent, Arnold Harris, is in Contempt of this Honorable Court for failure to appear in accordance with his retainer in the above entitled cause.
>
> WHEREFORE IT IS ORDERED that Arnold Harris be fined in the amount of $25.00 for Contempt of Court plus costs of $10.00."

Harris argues that the trial court had no jurisdiction to hold him in contempt since he did not file any appearance or otherwise hold himself out as Stafford's attorney in this case. He also argues that, in any event, there was no contempt of court because his absence did not embarrass the court, nor impede or delay its proceedings, since Stafford was tried on the trial date and found guilty.

The State responds that the trial court, in fact, found that Harris was retained as counsel and that the record supports the judgment of contempt for failure to appear in absence of any explanation by Harris.

We believe that the court did have jurisdiction of Harris on December 13th, when the order appealed from was entered. He had

actual notice of the outstanding rule to show cause which the court had previously entered. One who hears orally of a court's rule can be guilty of contempt for disobedience. People v. Kennedy, 43 Ill. App. 2d 299, 302 (1963). We perceive no reason why the rule should be different when one who knows of the rule having been issued voluntarily appears in open court, and it has been so held in O'Neil v. The People, 113 Ill. App. 195, 202 (1903). See also Anno. 12 A.L.R. 2d 1059, 1117.

On the question of whether the contempt order was erroneously entered, we are confronted first with the question of whether the court in its order purported to punish Harris for refusing to be sworn to explain his absence at the trial, or for his alleged contempt in not appearing at the trial of Stafford.

While there is a recital in the order that Harris refused to be sworn, the court's finding concludes that "the Respondent, Arnold Harris, is in contempt of this Honorable court for failure to appear in accordance with his retainer x x x". Since both the State and Respondent have proceeded on the theory that the failure to appear is thecontemptuous act which the court purported to punish, we also will assume that position.

Failure to appear for trial on behalf of a client may constitute criminal contempt of court which our courts have characterized as indirect contempt. The People v. Gholson, 412 Ill. 294, 298, 299 (1952); People v. Buster, 77 Ill. App. 2d 224, 233 (1966); People v. Rice, 96 Ill. App. 2d 253, 258 (1968).

An indirect contempt action requires, in addition to reasonable notice, the right to counsel, appropriate pleadings, an examination of witnesses, a hearing and adequate opportunity to answer the charges. People v. Rice, supra, at page 256; The People v. Gholson, supra, page 299. See also Bloom v. Illinois, 88 S. Ct.

1477; 20 L. Ed 2d 522 (1968). Defendant must be proven guilty beyond a reasonable doubt. People v. Gerrard, 15 Ill. App. 2d 301, 305 (1957); The People v. Hagopian, 408 Ill. 618, 620 (1951). Witnesses must be called and testimony taken. The People v. Rosenthal, 370 Ill. 244, 249 (1938). Proceedings to punish indirect contempts, involving conduct beyond the personal knowledge of the judge can be established only by extrinsic evidence. The People v. Ryan, 412 Ill. 54, 58 (1952); The People v. Skar, 30 Ill. 2d 491, 495 (1964).

The court's punishment of the alleged contempt was by a fine only and the act was not treated as a "serious offense"; and in that sense the holding in Bloom v. Illinois, supra, is not determinative here. However, that opinion makes it clear that the scope of due process in criminal contempt actions has been expanded rather than narrowed.

The hearing on the return of the rule against Harris, in our opinion, falls far short of complying with the authorities. No testimony was taken on December 13th. If there was intended to be a hearing on the rule, the complainant Stafford should have been present and Harris given the right to cross-examine him. In criminal contempt proceedings Harris was not required to testify.

The record at best shows a previous statement of Stafford that Harris was retained to defend him and the production of an undated retainer receipt which specifies "on account of legal services" but has no direct reference to the case on trial against Stafford. The State takes the position that the evidence was sufficient for the court to enter the rule and that Harris was then required to purge himself. In The People v. Skar, supra, the State also took the position that it could stand

on the petition for contempt that had been filed when no answer had been filed and without presenting further evidence. The majority opinion concluded that "it is clear from a consideration of the authorities discussed herein that due process requires something more". The court held that the defendant is presumed innocent until he is proven guilty beyond a reasonable doubt, and that extrinsic evidence was necessary to support the charges made in the petition. We take this to mean that the extrinsic evidence cannot be taken by the court outside of the presence of the defendant at a different time, but must be in the course of a judicial hearing on the contempt rule. On the particular facts of that case, a well reasoned dissenting opinion concluded that the trial judge was justified in considering that the respondent had waived his right to answer the allegations of the petition. In our opinion, the circumstances that were present in Skar, which could point toward a waiver in the minority view, were not present in any degree here.

There may be some question, additionally, as to whether the court was embarrassed, hindered or obstructed in the administration of justice within the meaning of The People v. Gholson, (supra, at page 298), inasmuch as the defendant did go to trial without his alleged counsel on the trial date. However, this inquiry may be pursued on a more complete record upon retrial.

We, therefore, reverse and remand.

REVERSED AND REMANDED.

DAVIS, P.J. and MORAN, J. concur.

118 I.A. 2nd 476

No. 69-58

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
FLOYD C. BRENNECKE,
Defendant-Appellant.

Appeal from the Circuit Court of the 19th Judicial Circuit, McHenry County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

The trial court, sitting without a jury, adjudged the defendant, Floyd C. Brennecke, guilty of Aggravated Incest(1) and sentenced him to 3 to 8 years in the penitentiary.

Defendant appeals, claiming that he was not proven guilty beyond a reasonable doubt and that there were prejudicial trial errors. Alternatively, defendant argues that it was error to deny probation.

The alleged victim was defendant's daughter, age "13½, going on 14". She testified that on August 16th, 1968, she was in bed, in a room of their house occupied by herself in one bed and two younger sisters in another; that she had gone to bed

(1) Ill. Rev. Stat. 1967, Ch. 38, Sec. 11-10. Aggravated Incest.)
(a) Any male person who shall perform any of the following acts with a person he knows is his daughter commits aggravated incest:
(1) Has sexual intercourse; or
(2) An act of deviate sexual conduct.

about 10:00 P.M. and was asleep when defendant came into the room with "nothing on". In answer to an initial question of "what happened that day", she used a common vulgarity,

"he tried to fuck me".

Asked to relate what happened, she testified,

"He tried to take my pajama bottoms off and he put his penis into me".

When asked whether she knew what a penis was, she answered,

"trying to fuck someone".

However, she answered "No" to whether she knew what a penis was.

She related that she had learned the vulgar term from her father. Again asked whether her father had put some part of his body into her, she answered, "Yes", "penis". Again asked whether she knew what the word was, she said, "I think so", and answered, "Trying to fuck".

On cross-examination the girl testified to the same circumstances she had related on direct examination and said she had told her father, "You had better leave me alone", and that she was going to tell her mother, but that he threatened to kill her if she did. She did not call out to her sisters. She said she told her mother on "the 16th", that "he tried to fuck me". She testified to "the same thing" happening on the 17th. When asked whether her mother had told her what to say, she said she was only to tell the truth.

The witness was in the 8th grade in school, in a special education class.

A doctor who had examined the girl on August 27th, 11 days after the alleged incident (the mother had called the doctor on August 21st and the appointment was made for a later date), concluded that it was likely that previous sexual activity had taken

place, but that there were other possibilities which could account for the conditions found upon his examination.

Defendant's wife, over objection, testified to a conversation with her daughter on August 21st in which her daughter related that her "dad has been making me go to bed with him". She also testified to finding a prophylactic in her daughter's bedroom on the morning of August 16th, but dismissed it as an effort by her husband to irritate her, giving a background of stormy relations between herself and her husband over a long period of time.

Defendant testified that he was home at the time in question, drinking beer and watching T.V. and went to bed about 12:00 P.M. His wife came home at 1:00 P.M. He denied committing the act charged at any time. He testified that his wife was having an affair and had made statements on many occasions that she was going to get him out of the house.

In finding the defendant guilty, the court reviewed the evidence in detail. Reference is made to the fact that the girl was examined carefully by the court prior to her testifying and after a defense motion urging that she was untrustworthy as a witness; and to the precautions the court took to keep the witness free from any suggestive testimony or influence. The court felt she was telling the truth.(2) The court concluded that her testimony was clear and convincing and no corroboration was needed, within the principles set forth in The People v. Rogers, 391 Ill. 264 (1945).

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(2) The court, in referring to the defense argument that the witness was not trustworthy because, although not a retarded child she was in need of special education, stated, "The Court, to the contrary, feels that it heard the witness; it feels that she is telling the truth. The mental difficulties, if any, were of such a nature that the court feels that they would militate against this witness entering into any kind of conspiracy or any kind of plan of her mother's to do the defendant any particular type of damage or get him out of the house or 'put him away', as the term was used initially in argument."

However, the court also concluded that there was corroboration in the presence of the defendant in the home, and in the testimony of the examining physician. The court stated that it "did not rely particularly" on the evidence of the contraceptive, because it felt that the "disposition of this particular item was not adequately explained".

The finding of the trial court that the testimony of the alleged victim was clear and convincing is based upon substantial evidence in the record and is sufficient to sustain the conviction standing alone. The People v. Rogers, supra, page 266. Under the circumstances shown by this record, we believe that the law committed to the trial judge the determination of the credibility of the witnesses and the weight to be accorded their testimony. The People v. Rogers, supra, page 267.

We distinguish The People v. Kolden, 25 Ill. 2d 327 (1962), cited by defendant. There the alleged victim was 9 years old and she said that she was testifying to what her attorney told her to say; there was a contrary signed statement by the girl and evidence that she was angry with her father because he had spanked her on the day in question. Here, although the alleged victim did not know the clinical definition of the word "penis", her statements, phrased in the language she said her father had taught her, left no doubt in the trial judge's mind, nor in ours, as to their meaning.

Defendant has challenged other evidence as not corroborative of the girl's story, but in view of our opinion that the trial court properly found that the testimony of the girl was clear and convincing, we need make only passing comments on the admission of other evidence.

The testimony of the examining physician was properly held corroborative to the extent that the court indicated it was being

considered. People v. Armstrong, 80 Ill. App. 2d 77, 84 (1967). The complaints to the mother verifying the essential details of the alleged victim's story must be considered as some corroboration of its truthfulness. The People v. Knapp, 15 Ill. 2d 450 (1959).

We do not find that the presence of the defendant in the home amounted to any substantial corroboration. The People v. Kolden, supra, page 330. It appears that the court may have mistakenly referred to The People v. Knapp, supra, in which the presence of a defendant in the home became material to impeach the testimony of an alibi. We believe, however, that this was harmless error in view of the whole record.

We adhere to the rule that we will not disturb a guilty finding in a bench trial in a criminal case unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt as to a defendant's guilt, in view of the opportunities for observation available to a trial court. The People v. Rogers, supra, page 267; The People v. Boney, 28 Ill. 2d 505, 510 (1963); People v. Oatis, 74 Ill. App. 2d 103, 109 (1966). We conclude that the defendant was proven guilty beyond a reasonable doubt.

Nor are we justified in interfering with the court's exercise of discretion in denying probation after a full hearing. The People v. Coolidge, 26 Ill. 2d 533, 542 (1963).

We, therefore, affirm the judgment below.

AFFIRMED.

DAVIS, P.J. and MORAN, J. concur.